

policy decisions relating to the Management Agreement stations, Kay has made the policies. Kay has paid all of Sobel's legal fees, including legal fees incurred in this hearing.

84. Kay is responsible for hiring, firing and supervising all the personnel involved in working on the Management Agreement stations. Under the agreement, Kay has the power to terminate Sobel's work on the Management Agreement stations at any time. The other people who work on the Management Agreement stations are all employees of Kay. Kay's absolute control over the personnel who work on the stations is important evidence of his control over the stations.

85. The most compelling evidence of Kay's control over the Management Agreement stations is his absolute control over the station's finances. The Commission has recognized that "one of the most powerful and effective methods of control of any business . . . is the control of its finances." La Star Cellular Telephone Company, 5 FCC Rcd 3286, 3292 n.12 (1990), quoting Cornbelt Broadcasting Co., 14 RR 2d 794, 795 (1968). Sobel did not have the funds to independently apply for and build these 800 MHz stations. In this case, Kay has taken over total responsibility for paying all expenses relating to the stations. He also has received all the operating revenue from the stations. Sobel has incurred no meaningful liability and the only money Sobel has received from the stations is (1) the hourly fee he received as a contractor selected and paid by Kay, and (2) the money Kay agreed to pay him in connection with the sale of certain stations. The money from these stations are deposited

directly into Kay's bank account. Every payment made with respect to the Management Agreement stations has been paid by Kay or his employees.

86. Significantly, Kay and Sobel have deviated from the agreement in a manner detrimental to Sobel. Under the language of the agreement, if any of the individual stations have revenue in excess of \$600 a month, Sobel is entitled to fifty percent of the excess revenue. Although four of the fifteen stations have each exceeded \$600 a month in revenue, Sobel has not received his share of any of the operating revenue. Instead, the parties have now decided that Kay shall keep all the revenue until the aggregate revenue from all the stations exceeds \$9,000 a month (as opposed to the current revenue of \$6,000 - \$7,000 a month). Sobel has no firm prospect of ever receiving any operating revenue from these stations. If the revenues ever exceed the threshold level, Kay can claim 100 percent of the revenue at any time by paying Sobel \$500 a station. Sobel is a financial cipher -- he has no financial liability, and the only money he receives from the operation of the stations is as a contract technician paid by Kay. Kay's control of the finances of the Management Agreement stations is absolute.

87. When all of the Intermountain factors are considered, the inescapable conclusion is that Kay, not Sobel, controls the Management Agreement stations. Kay was responsible for preparing the applications. He is responsible for managing the stations' day-to-day affairs, while Sobel's primary role is as a contractor paid by Kay. Kay makes the important policy decisions, hires and fires the personnel, pays the expenses, and receives the operating revenue.

This conclusion is inescapable based upon the totality of the evidence adduced in this matter, which demonstrates that Sobel has improperly transferred control of the Management Agreement stations to Kay. The transfer of control issue must therefore be resolved adversely to Sobel.

### **B. Misrepresentation/Lack of Candor Issue**

88. A misrepresentation is a false statement of fact made with an intent to deceive the Commission. Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 (1983). Lack of candor is a concealment, evasion, or other failure to be fully informative which is accompanied by an intent to deceive the Commission. Id. Intent can be shown in many ways. If a party makes a false statement which a party knows to be false, that is sufficient proof of an intent to deceive. "[T]he fact of misrepresentation coupled with proof that the party making it had knowledge of its falsity [is] enough to justify a conclusion that there was fraudulent intent." Leflore Broadcasting Co. Inc., 636 F.2d 454, 462 (D.C. Cir. 1980). It can be inferred when a party has a clear motive to deceive. See, e.g., RKO General, Inc., 4 FCC Rcd 4679, 4684 (Rev. Bd. 1989) ("First, while Gardner argues a lack of deceptive intent on his part, the facts nevertheless establish that he had a clear motive for deception when he submitted a divestiture pledge which he had no intention of fulfilling. Deceptive intent must be inferred from Gardner's deceptive conduct.") Intent can also be found when the surrounding circumstances clearly show the existence of an intent to deceive, even if there is no direct evidence of intent to deceive. American International Development, Inc., 86 FCC 2d 808, 816 n.39 ("The Board

is correct that the absence of direct evidence of motive is not significant where the record otherwise clearly establishes that deceptive conduct has occurred.")

89. The Commission must be able to rely upon the completeness and accuracy of information provided to it by its licensees and applicants. The Commission has far too many licensees and applicants to independently investigate each and every filing and claim made by those parties. If the Commission cannot believe and rely on its licensees' reports, it cannot maintain the integrity of its processes. Tri-State Broadcasting Co., Inc., 5 FCC Rcd 1156, 1173 (Rev. Bd. 1990). The Commission's demand for absolute candor is itself all but absolute. Emison de Radio Balmaseda, Inc., 7 FCC Rcd 3852, 3858 (Rev. Bd. 1992), rev. denied 8 FCC Rcd 4335 (1993). The classic statement of a licensee's duty of absolute candor is contained in the Court of Appeals opinion RKO General, Inc. v. FCC, 670 F.2d 215, 239 (D.C. Cir. 1981):

Unlike a private party haled into court, or a corporation such as General Tire facing an investigation by the SEC, RKO had an affirmative obligation to inform the Commission of the facts the FCC needed in order to license broadcasters in the public interest. As a licensing authority, the Commission is not expected to "play procedural games with those who come before it in order to ascertain the truth," FCC Brief at 60, and license applicants may not indulge in common-law pleading strategies of their own devise.

The trait of truthfulness is one of the two fundamental character requirements of all licensees, and acts of misrepresentation or lack of candor by a licensee are "serious breaches of trust." Policy Statement Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1211 (1986). Where the submission of false or inaccurate information results from an

intent to deceive, the remedy may be total disqualification, even if the facts are immaterial. FCC v. WOKO, 329 U.S. 223, 227 (1946), Standard Broadcasting, Inc., 7 FCC Rcd 8571, 8573-74 (Rev. Bd. 1992).

90. In this case, there is compelling and overwhelming evidence that Sobel repeatedly and intentionally misrepresented facts and lacked candor to the Commission concerning the relationship between himself and Kay. Sobel's filings to the Commission show a repeated refusal to provide any meaningful information concerning that relationship. Indeed, the statement Sobel submitted painted a false and misleading picture of the relationship between himself and Kay. Sobel's failure to be candid continued through the hearing in this proceeding. The misrepresentation and lack of candor issue must therefore be resolved against Sobel.

91. In order to understand Sobel's state of mind, it is important to look at the underlying circumstances at the time he signed the affidavits. Sobel understood that the Commission wanted to know what the actual relationship was between himself and Kay. He testified that he thought the Bureau was "confused" about the relationship, based upon the language in the draft Kay designation order. He claimed that the written management agreements entered into in October and December of 1994 were an attempt to explain that relationship. Under those circumstances, Sobel "had an affirmative obligation to inform the Commission of the facts the FCC needed in order to license" him. RKO General, Inc. v. FCC, supra. Sobel had a clear and unambiguous duty to fully inform the Commission of his

relationship with Kay. Indeed, if he truly believed that his relationship with Kay was appropriate and in full compliance with the Commission's Rules, Sobel had every incentive to come forward to fully explain their relationship and to correct the Bureau's "confusion" or "screw-up."

92. Instead, Sobel (and Kay) engaged in a pattern of conduct designed to mislead the Commission concerning Sobel's relationship with Kay. Sobel knew that in 1993, in three separate letters filed with the Commission, Kay had taken affirmative steps to conceal the fact that Kay was billing clients of Sobel's stations. While Kay's role in billing customers was not directly pertinent to the issues before the Commission, these actions show a predisposition towards concealing the true nature of the relationship. Similarly, Sobel's December 1994 letter to the Commission also paints a misleading picture of the relationship between himself and Kay. Sobel calls himself an "independent" radio dealer and claims he is not an employee of Kay. The claim that Sobel is independent of Kay, at least with respect to the Management Agreement stations, is a blatant misrepresentation in light of Kay's control of virtually every aspect of the Management Agreement stations. Furthermore, Sobel's letter fails to provide any accurate information concerning the Kay-Sobel relationship. It can only be concluded that Sobel wholly failed to meet his "affirmative obligation to inform the Commission of the facts the FCC needed in order to license" him. RKO General Inc. v. FCC, *supra*.

93. The January 1995 affidavits continued Sobel's pattern of deliberate concealment of the Kay-Sobel relationship from the Commission. Nothing in the affidavits provided an

accurate or complete picture of the relationship between himself and Kay. The following relevant information is not mentioned in the affidavits: (1) Kay manages Sobel's 800 MHz stations pursuant to a Management Agreement; (2) Kay was responsible for finding the frequencies and preparing the applications for the Management Agreement stations; (3) Kay provided all the money and the equipment needed to build the Management Agreement stations; (4) when Sobel worked on the stations, he did so as a contractor selected and paid by Kay; (5) Kay made the arrangements to acquire and dispose of these licenses; (6) Kay's employees were involved in virtually every aspect of the stations' daily operations; (7) Kay paid all the expenses of the Management Agreement stations, including Sobel's legal fees; (8) the revenues from the Management Agreement stations were deposited into the same bank account of Kay's as the revenues from the stations licensed to Kay, and Sobel did not receive any of the operating revenues of the stations; (9) Kay could purchase the Management Agreement stations at any time for \$500 each; and (10) Kay had agreed to purchase the stations upon Sobel's death. This information, without doubt, would have been relevant to both the Presiding Judge and the Commission in determining what to do with Sobel's licenses. Sobel's failure to reveal the true extent of Kay's involvement in the Management Agreement stations smacks of an intent to deceive.

94. Furthermore, there is ample evidence that Sobel intentionally withheld the information concerning the relationship between himself and Kay, and that the failure to provide that information reflects a lack of candor. Sobel acknowledged that he knew that the Commission wanted to know about the relationship between himself and Kay.

Notwithstanding that knowledge, he wholly failed to provide any information. His explanations as to why he did not provide the information are inconsistent with his other testimony and not credible. Sobel's claim that the Presiding Judge was not the correct forum for disclosing that information is unsupported and baseless. Sobel's affidavit was being submitted to the agency in an attempt to remove some of Sobel's licenses from the scrutiny of a hearing proceeding. Sobel believed that the Commission's inclusion of some of his licenses in the Kay designation order was caused by the Commission having erroneous information. Under those circumstances, Sobel had a clear and affirmative duty to provide the correct information and let the Presiding Judge in the Kay proceeding decide what action should be taken based upon that information. Instead, Sobel submitted a deliberately misleading affidavit which does not begin to describe the full scope of the business relationship between himself and Kay. Moreover, his claim that he expected their relationship to be probed in discovery in the Kay proceeding ignores the fact that the affidavit was designed to remove his licenses from the scope of the Kay proceeding. The Commission's requirement for absolute candor is specifically intended to prevent such "procedural games." RKO General, Inc. v. FCC, supra. If those licenses were removed from the Kay proceeding, there would be no basis for requesting discovery on the Kay-Sobel relationship. Furthermore, any supposition that the Commission might later ask questions about the Kay-Sobel relationship does not excuse Sobel's clear breach of duty to provide that information when he submitted the affidavits. Finally, Sobel's repeated claims that the affidavit was just designed to show that he was a real person, as opposed to a "ghost" or a/k/a of Kay, is inconsistent with the language of the affidavit. While the first sentence of the affidavit could be interpreted as



saying that Sobel is a real person, the rest of the affidavit makes claims that go far beyond Sobel's status as a real person. Accordingly, it must be concluded that the withholding of information constituted a deliberate lack of candor as opposed to a mistake or misunderstanding.

95. Moreover, there are specific statements in the affidavit that constitute misrepresentations or lack of candor. The most glaring misrepresentation is Sobel's claim that "Mr. Kay has no interest in any radio station or license of which I am the licensee." Given Kay's ownership interest in the equipment, Kay's direct role in acquiring and disposing of the licenses used in connection with the Management Agreement stations, Kay's receipt of the revenues derived from the operation of these stations, and Kay's right to purchase the Management Agreement stations at any time for \$500 at any time, Sobel's claim that Kay has no interest in the stations or licenses is an outright fabrication. More importantly, the record shows that Sobel knew Kay had an interest in the Management Agreement stations and that he intended to deceive the Commission when he claimed otherwise. First, Sobel admitted that Kay's receipt of monies was an interest, although he attempted to claim it was not an interest in the context of the affidavit. The affidavit was unconditional, however. It denied that Kay had any type of interest in any of Sobel's stations or licenses. Second, at the time Kay signed the affidavit, Kay told Sobel that a "direct financial stake" in something was an interest.<sup>7</sup>

---

<sup>7</sup> While Sobel testified that he does not think Kay said that to him, Kay's testimony must be credited. His testimony was specific and clear. Furthermore, Kay had no reason to invent that testimony. If anything, Kay's testimony was made against his own interest, because it indicates that Kay knew an affidavit he was submitting to the Commission was false.

Sobel knew that Kay had a direct financial stake in the stations. He therefore knew that the statement was false, and the element of intent to deceive was present. The statement was therefore a misrepresentation. Leflore Broadcasting Co. Inc., supra.

96. Furthermore, Sobel's attempt to explain why the affidavit is not a misrepresentation is inconsistent with the plain language of the affidavit. Sobel repeatedly claimed that he just meant that Kay did not have any interest in the licenses. The affidavit, however, denies that Kay has any interest in Sobel's "radio stations or licenses." While Kay denied having any interest in the licenses (even though he could purchase the licenses at any time for \$500 each, and must purchase the stations if Sobel dies), he acknowledged that he had an interest in the stations because he owned the equipment and received the operating revenue from the stations. When Sobel was repeatedly confronted with the fact that the affidavit refers to both stations and licenses, he was evasive and attempted to give the affidavit a meaning contrary to its plain language. The statement that Kay had no interest in any of Sobel's stations or licenses was thus a deliberate misrepresentation.

97. Another deliberate misrepresentation or lack of candor was Sobel's statement that "I am not an employer or employee of Mr. Kay . . ." Again, Sobel failed to disclose the pertinent facts -- in this case, that he performed extensive work for Kay as a contract technician both on stations licensed to Kay and stations licensed in Sobel's own name, and Kay paid him for that work. In his testimony, Sobel defended this statement by referring to IRS guidelines for distinguishing between an independent contractor and an employee.

Sobel's reliance on IRS guidelines in this instance is disingenuous. The relevant and meaningful information that the FCC was entitled to know was that Sobel devoted considerable time to working for Kay and that when Sobel worked on stations licensed to himself, he did so as a contractor selected and paid by Kay. In the common definition of the word "employ", "to use or engage the services of",<sup>8</sup> Kay employed Sobel. Whether the statement is considered an affirmative misrepresentation (because Kay did employ Sobel), or whether the unqualified statement, albeit technically correct, constitutes lack of candor (because it fails to provide material facts concerning the work Sobel did for Kay) (as in RKO General, Inc., supra), Sobel proffered this statement with the intent of deceiving the Commission and obfuscating the true facts.

98. The statement "Mr. Kay does not do business in my name and I do not do business in his name" is another instance of misrepresentation or lack of candor on Sobel's part. Sobel knew that the second part of the sentence was not true because, as part of Sobel's contracting and consulting business, he contacted customers on Kay's behalf and at Kay's request. With respect to the first part of the sentence, Sobel again failed to disclose the information that was pertinent to the Commission -- that Kay was operating, managing, and marketing in his business name stations that were licensed to Sobel. Sobel attempted to defend the statement on the grounds that his agreement with Kay is a separate agreement from Kay's agreement with the station's customers. That explanation ignores his clear duty to provide all pertinent facts to the Commission. The sentence paints a picture of independence

---

<sup>8</sup> Meriam Webster's Collegiate Dictionary, Tenth Edition, 1994, P. 379.

and separateness that did not exist in fact. Given Sobel's knowledge that the Commission wanted to know the relationship between himself and Kay, this statement must be seen as another example of lack of candor.

99. Sobel's affidavit painted an affirmatively misleading picture of the relationship between himself and Sobel. The affidavit leaves the impression that Sobel and Kay are independent businessmen while omitting the facts the Commission needed to evaluate their relationship. Furthermore, individual statements in the affidavit constitute misrepresentations or lack of candor. The evidence overwhelmingly demonstrates that Sobel acted with an intent to deceive the Commission. The misrepresentation and lack of candor issue must be resolved adversely to Sobel.

### **C. Sobel's Qualifications**

100. When an unauthorized transfer of control is accompanied by an intent to conceal the transfer of control from the Commission, the only appropriate conclusion is that the licensee is not qualified to be a Commission licensee, absent unusual mitigating circumstances. Black Television Workshop of California, 8 FCC Rcd 4192, 4200 (1993), Stereo Broadcasters, Inc., 87 FCC 2d 87 (1981). No mitigating circumstances are present here. Indeed, there are two aggravating circumstances which support the conclusion that Sobel is not qualified to be a Commission licensee. First, Sobel transferred control to an individual whose qualifications to be a Commission licensee are in doubt. Even if the transfer of control to Kay could be considered inadvertent and unknowing (and the record does not

support such a conclusion), the status of the Management Agreement stations could not be resolved without determining the qualifications of Kay to be a Commission licensee. Second, Sobel's failure to be candid with the Commission continued up through and during the hearing. At the hearing, Sobel never fulfilled his clear duty to provide the Commission with accurate and complete information. Despite the abundant evidence of Kay's control over the Management Agreement stations, he insisted that it was proper for him to declare under penalty of perjury that Kay had no interest in the Management Agreement stations.

101. In this instance, the appropriate remedy for Sobel's unauthorized transfer of control, misrepresentations, and lack of candor is revocation of all of his licenses. In determining the appropriate remedy for misconduct, the Commission considers the willfulness, frequency, and currency of the misconduct, as well as the importance of deterring future misconduct. Character Qualifications in Broadcast Licensing, *supra*. Here, the misconduct (particularly the misrepresentations and lack of candor) was extremely serious. The misconduct was willful, repeated or continuing, and continued throughout the hearing. A forfeiture alone would be a patently inadequate remedy because of the seriousness of the misconduct and because Sobel cannot be relied upon in the future to have the essential character traits of truthfulness and reliability. Moreover, merely revoking the Management Agreement licenses would not be a significant deterrent to dissuade future misconduct by Sobel or others. Sobel deserves to be punished for his misconduct. The Management Agreement stations are not a meaningful source of revenue to Sobel, and he has no firm expectation of receiving revenue from those stations in the future. Only by revoking all of

Sobel's licenses, including the UHF licenses which are not subject to the Management Agreement and from which Sobel receives significant revenue, can the Commission impose a meaningful sanction and show that it will not tolerate such serious misconduct.

102. With respect to the question of whether a forfeiture should be assessed against Sobel for an unauthorized transfer of control, it is concluded that if all of Sobel's licenses are revoked, the Presiding Judge need not necessarily assess a forfeiture against Sobel.

ACCORDINGLY, the Presiding Judge should order that the licenses held by Marc Sobel or Marc Sobel d/b/a AirWave Communications and designated for hearing in this proceeding ARE REVOKED, that the applications designated for hearing in this proceeding

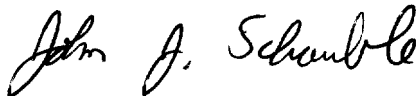
ARE DENIED, and that the finders' preference requests filed by Marc Sobel and designated for hearing in this proceeding ARE DISMISSED.

Respectfully submitted,

Daniel B. Phythyon  
Chief, Wireless Telecommunications Bureau

A handwritten signature in black ink, appearing to read "Gary P. Schonman".

Gary P. Schonman  
Chief, Compliance and Litigation Branch  
Enforcement and Consumer Information Division

A handwritten signature in black ink, appearing to read "John J. Schauble".

William H. Knowles-Kellett  
John J. Schauble  
Attorneys, Wireless Telecommunications Bureau

Federal Communications Commission  
2025 M Street, N.W., Suite 8308  
Washington, D.C. 20554  
(202) 418-0569

September 25, 1997

## CERTIFICATE OF SERVICE

I, John J. Schauble, an attorney in the Enforcement and Consumer Information Division, Wireless Telecommunications Bureau, certify that I have, on this 25th day of September, 1997, sent by first-class mail, copies of the foregoing "Wireless Telecommunications Bureau's Proposed Findings of Fact and Conclusions of Law" to:

Robert J. Keller, Esq.  
4200 Wisconsin Avenue  
Suite 106-233  
Washington, DC 20016-2143  
(Counsel for Marc Sobel and Marc  
Sobel d/b/a Air Wave Communications)  
(Via Hand Delivery)

Barry A. Friedman, Esq.  
Thompson, Hine & Flory  
1920 N Street, N.W., Suite 800  
Washington, D.C. 20036  
(Counsel for James A. Kay, Jr.)

Administrative Law Judge John M. Frysiak  
Federal Communications Commission  
2000 L Street, N.W.  
Second Floor  
Washington, D.C. 20554  
(Via Hand Delivery)

  
John J. Schauble